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No. 398.

**THE UNITED STATES, APPELLANT, v. THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY.**

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# In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 398

THE UNITED STATES, APPELLANT

*v.*

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY

## BRIEF FOR APPELLEE

### STATEMENT OF THE CASE

At different times during the years 1916 and 1917, The New York, New Haven and Hartford Railroad Company (hereinafter referred to as the New Haven Company), and its connecting carriers, at the request of the proper officers of the United States Army, transported as freight, certain Government property, known as military impedimenta, in connection with movements of United States troops (R. 13).

The New Haven Company, as last carrier, rendered its bills to the disbursing quartermaster, for

the transportation of said impedimenta, based upon rates contained in current freight tariffs (R. 13). There were fifteen bills in all (R. 8, 13, 14). Twelve of the bills were paid to the New Haven Company prior to January 1, 1918, and hence prior to the date of the Federal control of railroads (R. 13). The remaining three bills were disallowed by the Auditor for the War Department after the termination of Federal Control (R. 14). The Court of Claims found that on these three bills the New Haven Company was entitled to $3,015.11 (R. 14), and as the Government does not resist this portion of the judgment of the Court of Claims, the only bills involved in this appeal are the twelve bills which were paid to the New Haven Company prior to January 1, 1918, and which are set forth by numbers in Finding VIII (R. 13).

On December 28, 1917, the operation of the New Haven Company, with other railroads, was taken over by the Government (Act of August 28, 1916, Ch. 418, 39 Stat. 619, 645; President's Proclamation of December 26, 1917, 40 Stat. 1733), and the control and operation was relinquished by the Government on February 29, 1920 (Act of February 28, 1920, Ch. 91, 41 Stat. 457).

The Auditor for the War Department, in auditing the disbursing officer's accounts, disallowed the payments made to the New Haven Company on its twelve bills, to the extent of $9,160.89, under a ruling of the Comptroller (24 Comp. Dec. 774) (R. 11), that the Government was entitled to have had its military impedimenta carried free at the

rate of one baggage car for each group of twenty-five men transported (R. 13).

The New Haven Company was called upon by the Auditor of the War Department to refund the $9,160.89 disallowed, and upon its refusal to do so, the Auditor deducted this amount from bills of the United States Railroad Administration which had been presented to the Auditor for the War Department for payment (R. 13). The Railroad Administration subsequently charged the deduction of $9,160.89 to the New Haven Company, and, in January, 1921, this amount was paid by the New Haven Company to the Railroad Administration through the so-called "trustee account" which had been created by General Order No. 68, issued by the Railroad Administration to take effect at the termination of Federal control. The New Haven Company charged the amount on its own books in a suspense account against the War Department to await action by the Auditor or the Court of Claims (R. 13, 14, 18, 19, 20).

On April 26, 1919, the Director General of Railroads and the New Haven Company entered into an agreement concerning the operation of the New Haven's railroad by the Director General, and the material portions of said agreement are set forth in Finding XII (R. 15, 16, 17).

On March 21, 1922, the New Haven Company instituted suit against the United States in the Court of Claims, to recover the amount of the deductions (R. 1).

On October 26, 1923, a final settlement contract was entered into by and between the New Haven

Company and the Director General of Railroads, acting on behalf of the President and the United States. The final account and final settlement agreement are fully set forth on pages 22, 23, 24 and 25 of the Record.

## ARGUMENT

### I

### THE UNITED STATES IS THE PROPER PARTY DEFENDANT.

The Government's argument consists of two contentions; first, that the items involved in this suit were included in the so-called final settlement contract, and that hence suit is barred by said contract and release; and, second, that if the items were not included in the final settlement contract then the New Haven Company has an "open account" which should be settled with the Director General of Railroads. This latter contention will be discussed first.

It has been decided by the Court of Claims that the theory of the Comptroller that the Government was entitled to free transportation of its property on the basis of one baggage car for every twenty-five men transported, was erroneous, and that the deductions were unlawful.

> Missouri Pacific Railway Co. v. The United States, 56 C. Cls. 341.
>
> Alabama and Vicksburg Railway Co. v. The United States, 56 C. Cls. 496.

The fact that the Government is not offering any resistance to that portion of the judgment of the Court of Claims which relates to the amounts

which were disallowed directly from the New Haven Company's own bills, leads to the obvious conclusion that no appeal would have been taken had not the question of Federal control been involved. It therefore becomes necessary to examine the relationship of the parties concerned and to determine what effect, if any, the period of Federal control had upon the situation brought about by the deductions made by the Auditor for the War Department.

It should be borne in mind that the transportation services were performed and the freight bills paid to the New Haven Company before Federal control began (R 13). The matter was a closed issue until, in the month of April, 1918, the Comptroller issued the so-called "free baggage car ruling" (24 Comp. Dec. 774) (R. 11).

Under that ruling, the Auditor for the War Department figured that the New Haven Company had been overpaid to the extent of $9,160.89, and demand was made upon the New Haven Company to return this sum, which it refused to do. The Government then could have instituted suit against the New Haven Company to recover the amount which was claimed to have been overpaid. It did not choose to pursue this course. It was much easier to deduct the amount from future bills to be presented by the New Haven Company. But, at that particular time, the New Haven Company was not operating its property, the Government having assumed complete control through its agent, the Director General of Railroads. As the New Haven Company was not operating, it had

no transportation bills to present to the Government, hence there was no opportunity for the Auditor to deduct the $9,160.89 from bills of the New Haven Company. However, there was still another method which could be used and was used. The Director General of Railroads, operating the property of the New Haven Company, had bills for transportation which were presented to the War Department for settlement. These bills were allowed, but in making payment, the Auditor for the War Department charged against the Director General's bills, the $9,160.89 which the Auditor wanted to get back from the New Haven Company. The Director General, having thus paid the claim which the War Department had against the New Haven Company, very properly charged the $9,160.89 to the New Haven, as it had the right to do under the so-called Uniform Contract which existed between the Director General and the New Haven Company (R. 13, 14, 15). Under the terms of that contract, the Director General was made the agent of the New Haven Company to pay all expenses and claims arising out of the operation of the railroad prior to January 1, 1918, the date Federal control began. The Director General had the further right under that contract to charge any such payments to the New Haven Company, and he did so in this particular instance (R. 13, 14). And, carrying out its obligation to repay the Director General any amounts which he had expended for corporate matters of the New Haven Company, the sum of $9,160.89 was actually paid by the New Haven Company, in cash, to the Director General in the month of January, 1921.

The payment was made into an account known as the "trustee account", which was created by General Order No. 68 of the United States Railroad Administration, to take effect at the termination of Federal control. By this order the New Haven Company was made trustee for the Director General to collect the assets and pay the liabilities of the Director General after the termination of Federal control. Having paid the amount of $9,160.89 to the Director General, thereby making him whole, the New Haven Company brought suit in the Court of Claims to recover this amount from the Government.

Counsel for the Government now contend that inasmuch as the money was paid into the trustee account and that account was excepted from the final settlement contract, that the New Haven Company has an "open account" which should be settled with the Director General. It is difficult to see the logic of such an argument. The New Haven Company never had any dispute with the Director General concerning the deductions of $9,160.89, nor could it have a dispute or claim now. The transactions, out of which the deductions arose, all concerned the New Haven Company and not the Director General. The dispute was between the War Department and the New Haven Company as to the correctness of the free baggage car ruling. When the deductions were made from the Director General's bills, he had the right to charge them to the New Haven and the latter had no other choice, under the standard contract, than to accept the charge and make payment to the Director General. The money was paid to the Di-

rector General in January, 1921, and now, nearly five years later, the Government says the New Haven Company should seek the return of the money from the Director General, on the theory that the trustee account is still open and remains to be adjusted. There is no finding as to when or how the trustee account was to be adjusted, so that the Government's assumption that the account is still open, is unwarranted. As a matter of fact the trustee account is closed, but whether open or closed, is of little moment as far as this case is concerned. Let us assume, for the sake of argument, that the judgment of the Court of Claims should be reversed and the New Haven Company should seek to get the money from the Director General on the ground that the money was paid into the trustee account erroneously. Could it be reasonably presumed that the Director General would voluntarily pay back, nearly five years later, the money which was paid to him by the New Haven Company to reimburse him for money spent in payment of a claim against the New Haven Company?

It is more reasonable to presume that the Director General would stand upon the terms of the contract which gave him the right to pay the claim against the New Haven and placed the obligation upon the New Haven to make good to him. And, to carry the matter one step further, let us assume that the New Haven Company should sue the Director General to recover the amount. How could the New Haven Company escape the force and effect of the uniform contract and at this late date dispute the right of the Director General to have

paid the New Haven's claims, or deny its obligation to repay the Director General? Furthermore a suit against the Director General has been held to be, in effect, a suit against the United States. Sandoval v. Davis, Director General, 278 Fed. 968; In re Tide Water Coal Exchange, 280 Fed. 648. And if the claims were paid by the Director General, either voluntarily or as the result of a suit, where would he get the money to pay except from a Congressional appropriation or from some fund which had previously been appropriated by Congress? The Director General was, and is, only an agent, acting for the President and the United States, and the money to pay the New Haven's claim will have to come out of the United States Treasury, whether a judgment is secured against the United States or against the Director General. The net result would be the same regardless of the defendant.

The Court of Claims has found that any moneys erroneously paid into the trustee account by deposit in the bank where such account was kept could be withdrawn by a railroad company making such deposit, with the consent of the Director General (R. 14). But this is far from a finding that the money was erroneously paid into the trustee account by the New Haven Company, which is the basis of the Government's argument that the New Haven should adjust the matter with the Director General. There is nothing for the Director General to settle. This is not a question or dispute "arising out of or incident to Federal control", nor does it affect the question of compensation for

the use of the New Haven's property, which are the only matters which the Director General was to settle at the termination of Federal control.

It is a mere circumstance that the Director General was in possession of the railroad of the New Haven Company when the Auditor for the War Department sought to make deductions on account of alleged overpayments to the New Haven. The fact that the Director General, as agent for the New Haven, paid the claim by means of deductions from its own bills, and that the New Haven then made good the money to its agent, does not effect the legal situation between the Auditor for the War Department and the New Haven Company. The result, legally, was the same as though the deductions had been made directly from the New Haven Company's assets. The result, practically, was that the deductions were accomplished by two operations instead of one.

This suit was properly instituted against the United States, because the matter involved does not affect the Director General and does not come within any of the powers and duties conferred upon him in connection with the settlement of matters arising out of Federal control.

The New Haven has been outstanding this sum of $9,160.89 since January, 1921, and is entitled to recover this amount from the defendant.

## II

### THE FINAL CONTRACT OF SETTLEMENT BETWEEN THE DIRECTOR GENERAL OF RAILROADS AND THE APPELLEE IS NOT A BAR TO RECOVERY AGAINST THE UNITED STATES.

The Court of Claims has found that the $9,160.89 was paid to the Director General by the New Haven Company into a trustee account which "is expressly excepted from the effect of the settlement agreement" (R. 17). In view of this finding it is difficult to understand why the Government advances the argument that suit is barred by the final settlement contract.

The New Haven case is different from the cases of The United States v. The Reading Company, No. 401, The United States v. Southern Railway Company, No. 403, and The United States v. St. Louis, Brownsville & Mexico Railway Company, No. 404. In these cases the deductions were made from bills of the Director General, who then charged the deductions to the railroad corporations in the account "corporate transactions". The railroads then gave the Director General credit on their books. In other words the entire matter was handled by bookkeeping entries. There was no actual cash payments by the railroads to the Director General as in the New Haven case. The Government's attempt to compare the New Haven case with the cases cited above and its assumption that the deductions were charged in the same accounts and hence come within the final settlement contract, are unwarranted and unfounded in fact.

The New Haven paid the $9,160.89 to the Director General in cash. The money was paid into the trustee account created by General Order No. 68 of the United States Railroad Administration, and the Court of Claims has found that this account was not included in the final settlement contract.

## III

### CONCLUSION

The judgment of the Court of Claims should be affirmed.

Respectfully submitted,

BENJAMIN D. WINNER,
*Attorney for Appellee.*

No. 399. THE UNITED STATES, APPELLANT, v. CENTRAL NEW ENGLAND RAILWAY COMPANY

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# In the Supreme Court of the United States

OCTOBER TERM, 1925

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No. 399

THE UNITED STATES, APPELLANT

*v.*

CENTRAL NEW ENGLAND RAILWAY COMPANY

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## BRIEF FOR THE APPELLEE

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### STATEMENT OF THE CASE

During the years 1916 and 1917, the Central New England Railway Company and its connecting carriers transported certain military impedimenta in connection with movement of United States troops (R. 14). As terminal carrier, the Central New England presented its bills to the disbursing quartermaster on the basis of rates contained in current freight tariffs (R. 14). There were fifteen bills in all (R. 8, 9). The Government does not offer any resistance to the bills covered by Findings VII and VIII (R. 14), so the only bills involved in this appeal are the five bills set



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forth in Finding IX (R. 14, 15). These bills were paid by the disbursing officer, as presented, to the Central New England Company.

On December 28, 1917, the operation of the Central New England Company, with other railroads, was taken over by the Government (Act of August 28, 1916, Ch. 418, 39 Stat. 619, 645; President's Proclamation of December 26, 1917, 40 Stat. 1733), and the control and operation was relinquished by the Government on February 29, 1920 (Act of February 28, 1920, Ch. 91, 41 Stat. 457).

The Auditor for the War Department, in auditing the disbursing officer's accounts, disallowed the payments made to the Central New England Company on its five bills, to the extent of $1,843.94 (R. 15), under a ruling of the Comptroller (24 Comp. Dec. 774) (R. 11), that the Government was entitled to have had its military impedimenta carried free at the rate of one baggage car for each group of twenty-five men transported (R. 11).

Thereafter, the Auditor for the War Department deducted the amount of $1,843.94 from accounts of the Railroad Administration (R. 14). The Railroad Administration charged the amount deducted to the Central New England and the latter paid said amount to the Railroad Administration, subsequent to Federal control, through the so-called "trustee account", which was created by General Order No. 68, issued by the Railroad Administration to take effect at the termination of Federal control. The Central New England charged the amount on its own books in a suspense account against the War Department to await action by the Auditor on the Court of Claims (R. 15).

On February 13, 1919, the Central New England Company and the Director General of Railroads entered into an agreement covering the operation of the property of the Central New England by the Director General. The material portions of said agreement are set forth in Finding XII (R. 15, 16, 17).

On March 21, 1922, the Central New England instituted suit against the United States in the Court of Claims, to recover the amount of the deductions (R. 1).

On August 1, 1923, a final settlement contract was entered into by and between the Central New England Company and the Director General of Railroads, acting on behalf of the President and the United States. The final account and final settlement agreement are fully set forth on pages 22, 23, 24 and 25.

## ARGUMENT

The Central New England case is similar to the New Haven Case, No. 398, and reference is made to the brief and argument in that case to support the contention of the appellee that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

BENJAMIN D. WINNER,
*Attorney for Appellee.*

No. 400. THE UNITED STATES, APPELLANT, v. THE NEW ENGLAND STEAMSHIP COMPANY

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In the Supreme Court of the United States

OCTOBER TERM, 1925

No. 400

THE UNITED STATES, APPELLANT

*v.*

THE NEW ENGLAND STEAMSHIP COMPANY.

# BRIEF FOR THE APPELLEE

## STATEMENT

The New England Steamship Company transported a shipment of military impedimenta for the Government on September 20, 1915, for which a bill was presented to the Government for $139.00, which was paid in full (R. 8).

During the period of Federal control, the Auditor for the War Department deducted $124.00 from moneys due the United States Railroad Administration, claiming that the New England Steamship Company had been overpaid that amount as the result of the free baggage car ruling made by the Comptroller (24 Comp. Dec. 774) (R. 8).

The Railroad Administration charged the $124.00 to the New England Steamship Company, and in January, 1921, the Steamship Company paid said sum to the Railroad Administration into the trustee account, created by General Order No. 68 of the Railroad Administration (R. 8).

On February 28, 1919, the New England Steamship Company and the Director General entered into a contract covering the operation of the lines of the Steamship Company during Federal control (R. 9). The material parts of said contract are set forth in Finding X (R. 9, 10, 11).

On March 30, 1922, there was a final settlement contract entered into by and between The New England Steamship Company and the Director General of Railroads (R. 9). The final account and final settlement contract are set forth on pages 24, 25, 26 and 27 of the Record.

## ARGUMENT

This case is similar to the case of The United States v. The New York, New Haven and Hartford Railroad Company, No. 398, and the brief and arguments in that case are relied upon to support the contention of the appellee that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

BENJAMIN D. WINNER,
*Attorney for Appellee.*

Office Supreme Court,
FILED
OCT 28 1925
WM. R. STANSBU
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925

No. 401

THE UNITED STATES, *Appellant*,
*vs.*
READING COMPANY.

No. 402

READING COMPANY, *Appellant*,
*vs.*
THE UNITED STATES.

## APPEALS FROM THE COURT OF CLAIMS

## BRIEF FOR READING COMPANY

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*Of Counsel.*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925

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No. 401

THE UNITED STATES, *Appellant*,
*vs.*
READING COMPANY.

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No. 402

READING COMPANY, *Appellant*,
*vs.*
THE UNITED STATES.

## APPEALS FROM THE COURT OF CLAIMS

The above cases are really one case, No. 401 being an appeal by the United States, and No. 402 being a cross-appeal by Reading Company, which was the plaintiff below.

The opinion below has not yet been reported, but it is on pages 24-30 of the Record.

Judgment was rendered in favor of Reading Company, January 5, 1925, for $14,236.04 (R. 29, 42) on the first branch of the case, and dismissing the petition as to the second branch (R. 24, 29).

The action was to recover for transportation services rendered to the United States (R. 1-8), prior to the Federal

control of Railroads, and it was prosecuted under the statute conferring general jurisdiction on the Court of Claims.

The court below in its opinion divided the amounts sued for into two classes (R. 27, 29), and so treated them in the opinion, as will appear later.

## STATEMENT OF CASE FOR READING COMPANY

This case was before the Court of Claims several times (R. 9, 24). That court first awarded judgment to plaintiff for $14,236.04 (R. 9); then, on motions for new trials by both parties, the case was dismissed on the ground that a final settlement between the Director General and plaintiff operated as a release of these claims against the Government and finally, on plaintiff's motion for a new trial (R. 9), the plaintiff again had judgment for $14,236.04 (R. 42). The Government has appealed on the ground that by the contract of final settlement between the Director General and plaintiff, the latter released its claims against the Government; and the plaintiff is prosecuting a cross-appeal on the ground that it should have received a larger judgment.

The facts are as follows:

In the Fall and Winter of 1916-1917, plaintiff, as last carrier, handled a number of movements of troops and impedimenta from the Mexican Border to various points on its line in Pennsylvania (R. 8, 14, Finding VIII; R. 16, Finding X). For the freight service, it rendered bills to the disbursing officers of the United States Army, basing its charges for the transportation of the miscellaneous impedimenta—camp equipage, company property, etc.—upon Class A, Net Cash, and without land-grant deductions **(Finding X).**

Subsequently, June 18, 1918 (R. 11, Finding 3), the Comptroller General decided that under the provisions of carriers' baggage tariffs the Government was entitled to one free car for every twenty-five passengers in the accom-

panying passenger movement, and that was the first notification that the Government claimed one special baggage car or its equivalent for every twenty-five soldiers traveling with army impedimenta. Prior to that decision the Government paid for such impedimenta as freight (Finding 3).

Since that decision of the Comptroller the accounting officers of the Government have made settlements upon the basis that the United States was entitled to one baggage car free for the transportation of its camp equipment and company property for every twenty-five officers and enlisted men traveling (Finding 3, R. 12).

Bills were presented to the disbursing officer as above stated (Finding X, R. 16), and he notified the carrier that he was not authorized to pay on that basis (Opinion, R. 29), but only on the basis of the application of "Emigrant Moveables" classification to miscellaneous impedimenta (See R. 15, Finding IX), due to decisions of the Comptroller of the Treasury, and thereupon plaintiff restated the bills on that basis and they were so paid without protest (Finding X, R. 16, 17).

With the exception of bill 6629-30-31 (alias 74-76) (see Finding XI, R. 17), none of the bills was paid to plaintiff. They were all paid to the Director General of Railroads for plaintiff's account, subsequent to January 1, 1918, when Federal control began. (Appendix A; R. 30.)

Subsequently, upon a review of the disbursing officers' accounts, the Auditor for the War Department disallowed them (Finding XI, R. 17) and made deductions to adjust them to the basis of the current rulings of the Comptroller of the Treasury that, for the transportation of impedimenta accompanying troops, the Government was entitled to one car free for every 25 men (Finding IV, R. 12). This ruling was erroneous (Opinion, R. 27, 28); it was so held in the *Missouri Pacific case*, 56 C Cls. 341, wherein the court held that neither under the carriers' baggage tariffs (they are

all substantially alike), nor under the military agreements, was the Government entitled to the allowance. That court decision was acquiesced in by the Government, has been followed ever since, and its correctness is not questioned in this case.

The Auditor for the War Department made deductions of the equivalent amounts from outstanding bills of the Reading Railroad Administration for services rendered by the Railroad Administration itself (Finding XI, XII, XIII, R. 17, 18, 19). The Railroad Administration did not stand this loss. It simply "charged to the corporation" the amount of the deduction against the original receipts, and when the account in which the transactions appeared was prepared for the final settlement between plaintiff and the Director General of Railroads, plaintiff was credited therein with only the net proceeds—the amount remaining after the deduction of $14,236.04 (Finding XV, R., 20, 21), and the court found, "The deduction for free baggage, $14,236.04, did not enter into said account" (Finding XV, R. 21, last sentence).

## ARGUMENT ON FIRST BRANCH OF CASE COVERED IN NO. 401.

The opinion of the court below divides the case into two branches (R. 27), the first being "the amounts alleged to have been deducted from this plaintiff's bills because of the Comptroller's ruling (24 Comp. Dec. 774) relative to free transportation of impedimenta accompanying troop movements. * * *"

### THE FINAL SETTLEMENT AGREEMENT DID NOT INCLUDE, AND WAS NOT INTENDED TO INCLUDE, THE CLAIMS OR DEMANDS IN THIS ACTION.

1. We have set forth in the statement of the case that when the Auditor for the War Department made equivalent deductions of outstanding bills of the Railroad Administra-

tion the latter charged to the Corporation the amount of deductions against the original receipts, and when the account was prepared for the final settlement between plaintiff and the Director General, plaintiff was credited therein with only the net proceeds.

The course thus pursued was the natural one. Moreover, it was the one indicated by the construction given by both parties to Sections 4 and 9 of the Standard Contract between the Director General and appellant (R. 23, 24), whereby, to express it briefly, the plaintiff was to be credited with everything received for it, charged with everything paid out for it, and any claim for a balance returned to it as an uncollected account in the final accounting.

2. On June 30, 1922, the Director General of Railroads and plaintiff had a final settlement of their relations. The plaintiff went into and emerged from this final settlement with a credit of $14,236.04 less than it would have had but for the actions of the Auditor for the War Department in making the improper deductions on the first branch of the case and of the Railroad Administration in passing these deductions back to the plaintiff.

The contract of final settlement was in writing (Appendix C; R. 40) and the material part of it is set forth in Finding XVI, R. 22, as follows:

> The said Director General hereby acknowledges payment of the sum of eight million dollars ($8,000,000) by the said companies, the receipt whereof is hereby acknowledged, *in full satisfaction and discharge of all claims, rights, and demands of every kind and character* which the said director general or anyone representing or claiming to represent the director general, the United States, or the President now has or may hereafter have or claim against the said companies or any of them *growing out of or connected with the possession, use, and operation of the companies' property by the United States during the period of Federal control,* or out of the contract between the parties dated

the 18th day of February, 1920, and the said companies both jointly and severally hereby acknowledge the return to and receipt by them of all their property and rights which they are entitled to, and further acknowledge that the director general has fully and completely complied with and satisfied all obligations on his part, or on the part of the United States or the United States Railroad Administration, *growing out of Federal control.*

"*The purpose and effect of this instrument is to evidence a complete and final settlement of all demands of every kind and character as between the parties hereto growing out of the Federal control of railroads.* * * *" (Italics not in original.)

As stated at the outset, it is this instrument which serves as the foundation of the Government's appeal, and which it will urge upon this court, as in the court below, as constituting a release to the Government of claims for transportation on which, we submit, the Government has paid plaintiff *at least* $14,236.04 less than it should have paid. If the words "the United States" had been left out of the agreement, it seems probable that contention would not have been urged. It is plain, we submit, that those words are pure surplusage, as the contract would have meant the same thing without them, and that the United States was thereby released only from any liability of the Director General's. It will be noted that the instrument expressly states that it is a complete and final settlement *between the parties to it,*—the plaintiff and its subsidiaries on the one hand and the Director General on the other.

3. It will also be seen that the instrument acknowledges the return to and receipt by plaintiff of its properties and rights,—which include any outstanding claims against anyone owing the plaintiff, and therefore that statement includes this case.

4. The court found it to be a fact that "The deduction for free baggage, $14,236.04, did not enter into the said account" (R. 21) and so held in its opinion and judgment

(R. 24-29, 42). The "account" spoken of in that finding is the one prepared for the final settlement agreement. We submit that the fact stated in the above quotation takes the judgment for $14,236.04 out of the final settlement agreement, for the parties did not intend that branch of the case to be included therein.

It could not have been the intention of the parties to release to the United States the right to prosecute this case as, by the language of the agreement, it covers only claims, rights and demands "growing out of or connected with the possession, use, and occupation of the companies' property by the United States *during Federal control,* or out of the contract between the parties dated the 18th day of February, 1920." *This case and right of action grew out of transactions prior to such control. The statute and both contracts deal in terms with the period of Federal control only.* Had the parties intended by the final settlement agreement to release this case and right of action against the United States "it would have been easy to say so" in clear language, stating the purpose and naming the case, or so broadening the releasing language as to make it cover matters originating before the period of Federal control. The fact that such language was not used by the parties leads irresistibly to the conclusion that it was not intended that the agreement should cover this case, *then pending in the court below,* where it was filed December 3, 1920 (R. 1). The date of the final settlement agreement is June 30, 1922 (R. 21, 40).

5. We submit that further and unanswerable arguments are stated with clearness and great force in the opinion (R. 24) in which the court below holds that the services were performed and the bills rendered long before Federal control, and so they are beyond the terms of the Federal control act, the standard contract, and the final settlement agreement.

We submit that the judgment on the first branch of the case in No. 401 should be affirmed.

## ASSIGNMENT OF ERRORS BY READING COMPANY

APPELLANT IN No. 402

This appellant assigns the following errors by the Court of Claims in this case:

*First.* The court erred in dismissing the petition as to the items in the second branch of the case.

*Second.* The court erred in not rendering judgment in this appellant's favor for the additional sum of $2,426.86, the difference between the amounts stated by appellant in its original bills at Class A, Net Cash, rates, and afterwards restated without protest at Class D rates, with land-grant deductions.

*Third.* The court erred in not rendering judgment in this appellant's favor for the further additional sum of $4,564.06, difference between the amount allowed on the Class D rating and the amount due on the Class A, Net Cash, rating, on those bills (1-73, 77, 78 and 86-88-85-87-88-90) found to have been originally stated by plaintiff on the Class D basis.

## STATEMENT OF FACTS AND ARGUMENT ON FOREGOING ASSIGNMENTS

### SUMMARY OF ARGUMENT

1. Consideration of the facts on which the second and third assignments are based.

2. Disbursing officer's allowances or settlements did not remain undisturbed.

3. The Baltimore and Ohio and the Oregon and Washington decisions do not apply in law or in fact.

4. The decisions in the above cases are not even primarily applicable to this case.

5. There was an agreement for reduction of rates effective January 1, 1917, but no agreement was made thereafter for reduction.

6. Class D (Emigrant Moveable) classification is inapplicable.

7. Appellant in No. 402 is entitled to recover for the transportation of the miscellaneous impedimenta on the "Net Cash" classification.

8. This second branch of the case is not within the terms of the final settlement agreement.

## ARGUMENT

This second branch of the case covers the bills that were stated or restated on the Class D (Emigrant Moveables) basis and were afterwards paid without objection or protest by this appellant (R. foot p. 29).

We shall now state the facts and discuss the law.

1. The items making up the amount named in the second assignment are among the items stated in Finding X (R. 16, 17). Specifically they are as follows:

Bill 6629-30-31 for $1,018.50, restated at $657.65, a difference of $360.85;

Bill 79-80-82-83 for $1,950.60, restated at $633.01, a difference of $360.85;

Bill 81 for $423.90, restated at $194.93, a difference of $228.97;

Bill 84 for $499.53, restated at $255.57, a difference of $243.96;

Bill 93-103, inclusive, for $1,271.70, restated at $741.21, a difference of $530.49.

These are the bills covered by the sentence at the end of Finding X (R. 17) in the words:

> "The difference between the amounts stated by plaintiff in its original bills at Class A, Net Cash, rates

on military impedimenta, $4,909.23 and afterwards restated by plaintiff without protest, at Class D rates, with land grant deductions, $242.37, amounts to $2,426.86."

It will be noted that in Finding X (R. 16, 17), in describing the several bills above named, the court finds that each was so restated on the basis of Class D with land grant deduction, and the restated amount was paid by the disbursing officer. All those bills are put in the same category by the court.

The court followed this by finding (Finding XI, R. 17) that all restated bills referred to Finding X "were paid as restated by the disbursing officer to the Director General of Railroads beginning February 4, 1918, and ending June 14, 1918, pursuant to General Order No. 17, and were credited on the Railroad Administration books to the account 'Individuals and Companies,' and were not credited to the plaintiff."

General Order No. 17 is Appendix A (R. 30).

These restated items are of those described in the opinion (R. 27) where the court said the petition also claims "additional amounts which it is alleged the disbursing quartermaster deducted from its bills as if the shipments had consisted of emigrant movables under current rulings of the comptroller." So these bills are in the second of the "two general classes of claims" described in the opinion (R. 29).

2. The third assignment of error is that the court erred in not rendering judgment in this appellant's favor for the additional sum of $4,564.06, a difference over and above the amount allowed and paid, that was due on the cars of military impedimenta covered by bills 1-73, 77, 78 and 86-88-85-87-88-90, described in Finding X.

We shall now present those bills in their order, as described in Finding X (R. 16, 17).

(a) Bill 1-73 as originally stated was corrected and re-

stated by appellant at $18,835.92, but $85.60, feeding charges, was stricken out by someone, and the bill was paid by the disbursing officer in the sum of $18,750.32. "The classification of the military impedimenta in the original bill and the restated bill was the same and no part of the difference between the amounts stated in the original and restated bill was due to *a change* from Class A, Net Cash, to Class D" (R. 16).

We submit that it follows that the original and restated bills were on the Class D basis, for otherwise the disbursing officer would not have made the payment. He was following the ruling of the comptroller as to rates on military impedimenta, as the findings show.

(b) Bill 77 was originally stated at $3,482.06 and was restated and corrected in the sum of $2,134.66 and that sum was paid by the disbursing officer. "No part of the difference in amount between the original and corrected bill was due to change from Class A, Net Cash, to Class D, with land grant deduction on military impedimenta."

We submit that it follows that the bill was on the Class D basis, or the disbursing officer would not have made the payment, for he was following the ruling of the comptroller as to the rate on military impedimenta, as above stated.

(c) Bill 78 was originally stated in the sum of $179.40 on the "basis of Class D on military impedimenta with land-grant deduction, and was paid in that amount by the disbursing officer."

We submit that it follows that the bill was thus stated because of the disbursing officer's attitude in applying the decision of the comptroller, as stated above.

(d) Bills 86-88-85-87-90 were originally stated in the sum of $1,482.42 "on the basis of Class D military impedimenta, with land-grant deduction, in which amount it was paid by the disbursing officer."

We submit that if they had not been stated in that way the disbursing officer would not have made payment, for his attitude was as we have stated above.

All three of these assignments of error relate to the refusal of the Court of Claims to render judgment in this appellant's favor for the difference between the amounts due and allowed by the judgment on the Class D (Emigrant Moveables) basis and the amounts due on the basis of the correct classification for the transportation of miscellaneous military impedimenta. The second and third assignments are but particulars of the first, and all the assignments can be presented together conveniently.

DISBURSING OFFICER'S ALLOWANCES OR SETTLEMENTS DID NOT REMAIN UNDISTURBED.

We submit that the disbursing officer's allowances or settlements once made did not remain *undisturbed,* for it is shown by Finding XI (R. 17) that at one time the auditor for the War Department disallowed the disbursing officer's payments and caused a deduction of $10,853.71; and by Finding XIII (R. 18) that at another time the disbursing officer's payments were suspended and a deduction of $3,382.33 was made to adjust the payments on these bills to the basis of an allowance of one cat free for every 25 men.

So, even if appellant would have been bound by the original settlements with the disbursing officer, it certainly cannot be said to be bound when those settlements were overturned and something else substituted in lieu thereof, to which it had never agreed.

BALTIMORE AND OHIO AND OREGON AND WASHINGTON DECISIONS DO NOT APPLY.

The effect of the judgment of dismissal is to force upon this appellant the settlements once made on an admittedly erroneous basis, settlements which the Government itself had repudiated, and to dismiss appellant's demand for judgment on the correct basis. All this on the lower court's theory that the case is governed by the decision in the *Baltimore & Ohio case,* 52 C. Cls. 468, and by the decision

in the *Oregon-Washington Ry. & Navigation Co. case*, 255 U. S. 339.

We submit that the cases above named do not apply to this case, are not relevant to it, but if we are mistaken in that, the facts of this case take it out of the operation of the rule laid down in those decisions. So clear is it that we are correct in the alternative that it is submitted we might well rest our appeal on that ground alone; but we argue the inapplicability of the decisions relied upon by the Court of Claims, we hoping for a ruling by this court which will dispel some confusion now existing in the Court of Claims decisions, and so relieve this court of future petitions for writs of certiorari.

In reversing the Court of Claims in *St. Louis, Brownsville & Mexico Ry. Co.* v. *United States*, decided April 27, 1925 (No. 310, October Term, 1925), this court covered pretty much the same ground we now ask it to review—the only difference between the two cases being that in the *St. Louis, Brownsville & Mexico case* the bills were arbitrarily reduced by the disbursing or accounting officers without protest by plaintiff, while in this case the bills were either reduced by the carrier without protest, and to meet the attitude of the disbursing officer, to the basis upon which he could make payment, or else were originally so stated by claimant for the same reason.

THE BALTIMORE AND OHIO AND OREGON-WASHINGTON DECISIONS ARE NOT EVEN PRIMARILY APPLICABLE.

In those cases, the carriers, after claiming and receiving the proper tariff classifications (the lack of which is the basis of this appellant's complaint), and the proper tariff rates, deemed that, outside of and beyond any question of rates and classifications, the Government was entitled to the right to land-grant deductions. In this they were mistaken but, nevertheless, for many years without interruption, they rendered their bills and accepted payment on

that basis without protest or objection. They misconstrued the law against themselves and, no question of tariff rates or classifications being involved, the Court of Claims and this court held that they could not recover the deductions (or reductions) which they had always conceded and never claimed.

But the instant case is quite different. Here the carrier stated its bills on what it claimed to be the proper classification, and was induced by the attitude of the disbursing officer to restate them on the basis of a classification on which he was authorized by the Comptroller's rulings to make payment, or else, *for the same reason*, it originally stated its bills on that same basis, one which the Court of Claims has frequently held erroneous. The appellant here simply began or ended by claiming from the United States, in its final bills, less than it was entitled to, just as the carriers did in the cases of *Pitts. C. C. & St. L. Ry. Co. v. Fink*, 250 U. S. 577, and *N. Y. C. & H. R. R. Co. v. York & Whitney Co.*, 256 U. S. 406, wherein this court held that carriers were not barred from recovering the lawful rate merely because of having first demanded, received and accepted less than was due them. In the instant case, there was not present any of the elements of accord and satisfaction, the Government took all, the carrier nothing, simply receiving payment from the disbursing officer of less than was due on the proper tariff basis.

THERE WAS AN AGREEMENT FOR REDUCTION OF RATES EFFECTIVE JANUARY 1, 1917, BUT NO AGREEMENT MADE THEREAFTER FOR REDUCTION.

1. By Section 22 of the Act of March 2, 1889 (25 Stat. 862, Ch. 381), it is enacted, "That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States * * *." Accordingly, prior to January 1, 1917, this appellant and all the other lines parties to the interterritorial military

arrangements, which became effective that date, were parties to agreements, known as "military agreements," between the carriers and the War and Navy Departments, which were for the most part similar to and superseded by the later arrangements (Finding V, R. 12). That finding sets forth the essential terms of that "military arrangement," and Finding VI shows why and how the Comptroller and the Secretary of War approved it. Finding VII shows that it was in full force and effect as late as May 20, 1920, that its provisions have been observed by carriers generally, and that under it the Government has paid for transportation at rates substantially 5 per centum less than it otherwise would have paid. See also Finding VIII.

Thus there was a reduction by agreement of rates given to the Government, effective January 1, 1917, and remaining in force as late as May 20, 1920. We submit that no additional reduction of rates could be put on this appellant by the ruling or action of the accounting officers, although such additional reduction might have been made by agreement at or before the making of a shipment. *There is no such agreement in this case.* On the contrary, Finding VIII (R. 14) shows that "The troops were transported on *regular transportation requests* at rates substantially 5 per cent less than the regular tariff rates, and the Army impedimenta was moved as freight on *bills of lading* issued by the Government." (Italics not in original.)

The Government, in executing its "transportation requests" and "bills of lading" could have made a particular classification or proposed lower rates, and if there had followed an acceptance by the carrier affirmatively, or by making the movements without objection, a lawful agreement would have been reached. *There is no such agreement in this record.* On the contrary, Finding VIII shows that the regular order prevailed.

We submit that it did not lie in the power of the account-

ing officers, *after the movements had been completed and the bills presented,* to require a further reduction in the absence of a previous agreement in one form or another.

2. We have found no case holding that carriers, having no such agreement with the United States, are less entitled to recover their proper charges from the Government than from any other shipper. So to hold would be to hold that there was something in the nature of sanctity pertaining to Government payments, whether right or wrong. As a matter of fact, they should be less sacred than settlements by private parties. It is a matter of common knowledge that the government does business with carriers on credit; its settlements with them are based upon rulings of its own officials and frequently are long delayed; it always has its records to defend it against the subsequent assertion of claims; the transportation charges it has to pay make no difference in its business. On the other hand, it is a matter of common knowledge that private parties pay cash on delivery of their goods, and they pay according to carriers' demands; frequently they keep no records; and always the transportation charges are an element in their cost of living, or doing business, or in the price of their goods for sale. There was much more equitable reason to declare the carrier estopped in the *Fink case,* where its original voluntary demand was satisfied, than to declare it estopped in this case where its original demand was either reduced, or was originally stated, according to the attitude and limitations of the authority of the agent the Government had established to deal with its bills, *but not to make contracts.*

We respectfully submit that this court should hold that a carrier, by merely understating its claim against the Government in applying the wrong rate or classification is not thereby or thereafter estopped to claim the correct rate or classification by failing to make a protest. In other words, we submit that the Government should be held to be as

much subject to the carriers' lawful classification and rates as any other shipper. Such a ruling by this court will in no wise limit the authority of its *Oregon and Washington* decision, nor negative the view that, because the Government may by an agreement be the beneficiary of lesser rates than the ordinary shipper, a carrier may be estopped by an accord and satisfaction in its dealings with the Government.

THE FACTS OF THIS CASE TAKE IT OUT OF THE RULE LAID DOWN IN THE BALTIMORE & OHIO AND OREGON & WASHINGTON CASES, EVEN IF THEY WERE PRIMARILY APPLICABLE.

What we have to say now relates both to the bills found to have been originally stated on the Class A, Net Cash, basis and then restated on the Emigrant Moveables (Class D) basis, and to those found to have been originally stated on the latter basis. It may be that the restated bills will afford a point for discussion merely because they were originally claimed on the Class A, Net Cash, basis, but we submit that in the last analysis it makes no difference—for this appellant's right to recover on the correct classification basis on those bills found to have been originally stated on the erroneous basis is just as clear as it is on the restated bills.

We submit that we have shown that the *Baltimore & Ohio and Oregon & Washington* decisions have no relevancy to this case; but, as we have also submitted, even if we were mistaken about that, the facts of this case take it out of the operation of the rule in the cases referred to.

The only theory upon which the *Baltimore & Ohio and Oregon & Washington* decisions could be authoritative here would be that the disbursing officer's settlements, once made, were final and remained undisturbed. But they were not final here, nor did they remain undisturbed, as we have said before. It is shown by Findings XI (R. 17) and XIII (R. 18) that the Auditor for the War Department

suspended the disbursing officer's payments and made deductions to adjust them to the basis of an allowance of one car free for every 25 men, repudiating and overturning the settlements and *recapturing the money that had been paid*. Certainly, in these circumstances, this appellant is free to sue for what it regards as its rightful due. In other words, even if appellant would have been bound by the original settlements with the disbursing officer, it certanly cannot be said to be bound when those settlements were overturned.

We submit that the decisions cited by the Court of Claims have no bearing on this case, regardless of how the original bills were stated, and this appellant should recover upon the basis of the correct classifications.

THE CLASS D (EMIGRANT MOVEABLES) CLASSIFICATION INAPPLICABLE.

It is not thought that it will be claimed by the Government in this case that the Emigrant Moveables classification is applicable, since the Court of Claims in numerous cases has held against that classification in judgments rendered wthout opinions, which have been accepted by the Government without appeal. However, we point to the description of the term "Emigrant Moveables" quoted from the classifications on page 15 of the Record, and we refer to the fact that this miscellaneous military impedimenta was not and could not be in fact "Emigrant Moveables." It may be well, also, to point out that it is evident that the transportation of emigrant moveables is done in the ordinary freight service, while here freight went with the troops (Finding VIII, R. 6). The difference in such service would be sufficient to relieve the impedimenta of the character of "Emigrant Moveables" even if that classification might otherwise be imposed upon it by analogy.

The "Emigrant Moveables" classification, the one to which this appellant was held by the court's judgment (R.

29) being inapplicable, and plaintiff being entitled to recover upon the correct classification basis, it remains to determine what the correct classification is.

THIS APPELLANT IS ENTITLED TO RECOVER FOR THE TRANSPORTATION OF THE MISCELLANEOUS IMPEDIMENTA UPON THE BASIS OF THE "NET CASH" (THAT IS, BULK) CLASSIFICATION.

It wil be observed that Finding IX (R. 14, 15), finds that at the time of this transportation plaintiff's tariff classifications contained the following classifications:

1. "Classifications for the different articles composing said shipment";
2. The "Emigrant's Moveables" classification;
3. "Camp Equipage; minimum weight 30,000 pounds, Carloads, Class A (Net Cash)."

The "Emigrant's Moveables" classification being inapplicable for the reasons heretofore stated, and it not being found that the Government's shipping officers specified the contents of their shipments, we submit that the Class A, Net Cash (i. e., without land-grant deductions) classification is the only one applicable, as shown by the findings.

The army officers could have taken advantage of the ordinary classifications by weighing and describing the contents of their shipments just like any other shipper, so that carriers' charges could be definitely ascertained and stated accordingly, but it is not found that they did so.

"In respect to furnishing transportation, a railoard ordinarily bears to the Government the same relation that it does to a private person using its facilities." *St. Louis, Brownsville & Mexico Ry. Co.* v. *United States*, No. 310, October Term, 1924, decided April 27, 1925.

The Court of Claims sustained the application of the "Net Cash" classification in the cases of *Maine Central Railroad Company* and *Bush, Receiver of the Missouri Pacific Ry. Co.*, 56 C. C. 490, as is shown by the findings, not printed. There were no opinions in those cases.

It is not apparent in this case that the Court of Claims intended to recede from its judgments in the above cited cases. Rather, it appears that, being impressed with the idea that the claim for the difference between the "Emigrant's Moveables" classification rates and the "Net Cash" rates was subject to the doctrine of the *Baltimore and Ohio* and *Oregon and Washington* decisions, the court dismissed this second branch of the case on that ground alone.

## THE SECOND BRANCH OF THE CASE IS NOT WITHIN THE FINAL SETTLEMENT AGREEMENT.

We submit that the services were rendered and the bills presented before Federal control, and so they are not within the terms of the Federal control act, or the standard contracts, or the final settlement agreement, a subject discussed in a previous part of this brief.

Finally, we submit that the judgment on the second branch of this case, No. 402, should be reversed and the court below be instructed to render an additional judgment in favor of this appellant in the sum of $2,482.37 (foot of Finding X, R. 17), and for such additional amount on the items covered by the third assignment of error as the evidence may establish. The amount stated in that assignment, $4,564.06, is our view of the amount due after considering the evidence before the trial court, over and above the amount allowed and paid, that was due on the cars of military impedimenta covered by the bills we have enumerated.

## CONCLUSIONS

Our conclusions are these:

1. The judgment of the court below in the sum of $14,236.04 should be affirmed.

2. The judgment dismissing the second branch of the case should be reversed and the court directed to render

an additional judgment in this appellant's favor in the sum of $2,426.86.

3. The judgment dismissing the second branch of the case should be reversed and the court directed to render an additional judgment in this appellant's favor in the sum of $4,564.06, or such other amount as the evidence may justify.

Respectfully submitted,

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*Of Counsel.*

Office Supreme Court, U.
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1925.

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No. 401

THE UNITED STATES, *Appellant,*

*vs.*

READING COMPANY.

---

No. 402

READING COMPANY, *Appellant,*

*vs.*

THE UNITED STATES.

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APPEALS FROM THE COURT OF CLAIMS

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## BRIEF FOR READING COMPANY IN ANSWER TO GOVERNMENT BRIEF.

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L. T. MICHENER,
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WM. L. KINTER,
F. CARTER POPE,
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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## APPEALS FROM THE COURT OF CLAIMS

---

## BRIEF FOR READING COMPANY IN ANSWER TO BRIEF OF THE UNITED STATES.

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### SUMMARY OF ARGUMENTS.

1. The court below did not err in considering the final account of the final settlement, that account being the basis of the final settlement agreement.

2. In the absence of a special agreement for the transportation in question, it was the duty of the carrier to claim and enforce the payment of the tariff charges for the transportation service.

3. The law has placed it beyond the power of the carrier or the Government to deviate from the tariff charges applicable to the transportation service, and the final settlement account and agreement are not to be so construed as to violate the law.

## ARGUMENT.

### I.

*The court below did not err in considering the final account of the final settlement, that account being the basis of the final settlement agreement.*

On pages 16, 17 and 18 of the brief for the United States it is contended that the "so-called account of final settlement (R. 20) bears no date and on its face purports only to adjust claims to March 31, 1922", and that there is no finding that it had "any connection with or relation to the final settlement agreement. There is a period of three months—March 31 to June 30—which the so-called settlement account on its face does not cover". On those statements is based the Government's contention that the account should not have been considered in connection with the final settlement agreement.

We submit that opposing counsel are in error in contending that there is no finding that the account had "any connection with or relation to the final settlement". These are the opening words of Finding XV, "The final account of the final settlement between the Director General of Railroads and the plaintiff reads as follows:". So it was in fact the *final account* of that *final settlement*—an all important part of the final settlement—one agreed to by all the parties.

The account, near the beginning of Finding XV (R. 20),

states that it is a "Comparison of claims submitted by the Philadelphia and Reading Railway Company (now Reading Company) with books of the central administration adjusted to March 31, 1922." Evidently all parties had been preparing for the day when a final settlement agreement would be made, and an account was to and did form the basis of that agreement.

It stands to reason that the account was prepared after March 31st and was presented to the carrier before the final settlement agreement was signed June 30, 1922. It is to be noted particularly that the account (R. 21) shows a "net balance due from corporation" of $8,000,000, and that the Director General in the final settlement agreement (R. 22) acknowledged the payment of $8,000,000 in full satisfaction, etc. Thus the account and that agreement are in complete accord. The amount of $8,000,000 agreed upon and paid could not have been ascertained except by consideration of the account. All this means negotiations between the parties and an accord that found expression in the final settlement agreement. It stands to reason that the account was bodily present or in mind when the agreement was reached and signed, and that the huge payment was not agreed upon in a haphazard manner. It was not "taken out of the sky."

We submit that the court below did not err in considering that account in relation to the final settlement agreement (see last paragraph of Finding XV (R. 21) and the opinion (R. 29), for the account shows the claims that were asserted by all sides to the controversy and the amounts of the existing differences between the parties. It is apparent, therefore, that only those claims, demands and differences were canvassed in reaching the amount of $8,000,000 as the net balance due from the corporation. By agreeing upon the account and fixing that amount, the parties made that account a part of the final settlement agreement just as surely as if formal language had been used in the way of a recital setting forth the ac-

count *totidem verbis*, thus making applicable the familiar common law rule that where there are recitals of particular claims or considerations, followed by general words of release, the general words shall be restrained by the particular recital. *Texas Pac. Ry. Co. v. Dashiel*, 198 U. S. 521, 527; 2 Parsons on Contracts, 7th ed. foot p. 633, side p. 501, *note*, where many English and American cases are cited.

II.

*In the absence of a special agreement with the Government for the transportation in question, it was the duty of the carrier to claim and enforce the payment of the tariff charges for the transportation service.*

That rule of law makes inapplicable the entire argument presented in the brief for the United States, including the "release or receipt" cases quoted from on pages 18 to 28 inclusive. The only one of those cases that relates in any manner or form to transportation charges is *St. Louis, Brownsville & Mexico Ry. Co. v. United States*, 268 U. S. 169, *and there is no release in that case.*

In an action for the recovery of transportation charges the carrier is *sui generis*, as we expect to show in the following pages, for it is the legal duty and obligation of the carrier, in the absence of a special agreement, to claim and enforce the payment of the tariff charges for the services rendered. In such matters the carrier does not have the privilege or right to deviate, refund, remit, release, or abate the tariff charges, directly or indirectly, in any manner or form.

The carrier engaged in interstate traffic service is surrounded by statutory barriers that do not exist as to persons or corporations engaged in other business, hence it follows that many rules of law applicable to the latter do not apply to the carrier.

It was the duty of the carrier to claim and enforce the

payment of the tariff charges, not to deviate, release, refund, remit or rebate them in any manner or form.

Interstate Commerce Commission Conference Ruling 314 is as follows:

> "The law requires the carrier to collect and the party legally responsible to pay the lawful established rates without deviation therefrom. It follows that it is the duty of carriers to enforce their legal remedies in order to collect undercharges from the party or parties legally responsible therefor. It is not for the Commission, however, to determine in any case which party, consignor or consignee, is legally liable for the undercharges, that being a question determinable only by a Court, having jurisdiction and upon the facts of each case." (Superseding Rulings, 3 and 187. See also rulings 16 and 156 and Y. & M. V. R. Co. vs. Zemurray, 238 Fed. 789.)

That ruling is printed in 45 I. C. C. Rep. on p. 96 of the appendix. It is dated May 1, 1911, and is declarative of the duty of carriers to collect the established tariff rate by the enforcement of their legal remedies against the parties legally responsible, and it is a warning to them not to indulge in any other course in any manner or form whatever.

To preserve inflexibility and make rates unalterable was the effect and purpose of Conference Ruling 314.

April 5, 1915, this court decided the case of *Louis. & Nash. R. R. Co. v. Maxwell*, 237 U. S. 94. The action was to recover from Maxwell $58.30, as the amount of an alleged undercharge on the sale of railroad tickets to Maxwell. "The agent fixed the routing in the tickets and named the fare, and Maxwell paid without further question" (top of p. 97). The agent made a mistake in naming the amount of the fare, and the company sued for the undercharge. On p. 97 this court said:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation

from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The Act (Sec. 6) provides:

"Nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs."

That section is a part of Section 6 of the Hepburn Act of June 29, 1906, p. 587, ch. 3591, and it is still in force.

*Gartner on the Interstate Commerce Act*, 95, 97.

It is unlawful for a carrier to accept less than the tariff rate as compensation for the interstate transportation of property, and the shipper or consignee is liable for the full tariff rate.

*Pitts. C. C. & St. L. Ry. Co. vs. Fink*, 250 U. S. 577; *N. Y. C. & H. River R. R. Co. vs. York and Whitney Co.*, 156 U. S. 406.

**In the *Fink case*** the opinion was written by Mr. Justice Day, who said on page 580:

The facts are that the railroad company on September 13, 1910, delivered to Fink, the consignee, two boxes of Indian relics shipped to him at Dayton, Ohio,

> from Los Angeles, California, the waybill specifying charges in the sum of fifteen dollars, which sum Fink paid upon receipt of the goods. The tariff rates filed with the Interstate Commerce Commission so classified this merchandise that the transportation charges should have been thirty dollars instead of fifteen. It is for the difference that this action is prosecuted.

On page 581 it was held that the purpose of the Act to Regulate Interstate Commerce was to provide one rate for all shipments of like character, and to make the only legal charge for the transportation of goods in interstate commerce the rate duly filed with the Commission, thus avoiding discrimination and giving all like treatment, which is the main purpose of the Act to secure. Then Section 6 of the Act to Regulate Commerce was quoted, and it was said (p. 581):

> It was, therefore, unlawful for the carrier upon delivering the merchandise consigned to Fink to depart from the tariff rates filed. The statute made it unlawful for the carrier to receive compensation less than the sum fixed by the tariff rates duly filed. Fink, as well as the carrier, must be presumed to know the law, and to have understood that the rate charged could lawfully be only the one fixed by the tariff.

In the course of the opinion the *Maxwell case* was cited and applied. The *Fink case* was followed in the *York & Whitney Company* case and it was held that the consignee of the freight could not escape the liability imposed by law through *any contract with the carrier*. In the case at bar, the consignor and consignee was the United States.

Applying the decisions and the statute quoted, we submit that the carrier did not lose the right to recover here because it executed the release, and failed to object or protest when stating or restating its freight bills or their payment.

## III.

*The law has placed it beyond the power of the carrier or the Government to deviate from the tariff charges applicable to the transportation service, and the final settlement account and agreement are not to be so construed as to violate the law.*

We submit that the final settlement agreement is not to be so construed as to embrace either branch of this case, for the laws of the land entered into and became parts of that agreement.

In *Van Hoffman vs. City of Quincy,* 4 Wall., 535, 550, it was said:

> It is also settled that the laws which subsist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it, as if they were expressly referred to or incorporated in its terms. This principle embraces alike those which affect its validity, construction, discharge, and enforcement.

That language was quoted with approval in *Hendrickson vs. Apperson,* 245 U. S. 105, 112, and the rule has been applied in many cases. Among them are:

> *Walker vs. Whitehead,* 16 Wall., 314, 317;
> *Brine vs. Insurance Co.,* 96 U. S. 627, 637;
> *Barnitz vs. Beverly,* 163 U. S. 118, 127.

We now submit that to construe the final settlement agreement to mean that the Railway Company released its claim for charges on freight carried for the United States would make that agreement do what the statutes of the United States forbid.

The Hepburn Act of June 29, 1906 (34 Stat. 584, 587, ch. 5391, sec. 6) contains this language:

> No carrier unless otherwise provided by this Act, shall engage or participate in the transportation of

passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; *nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified,* nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs; Provided, That wherever the word "carrier" occurs in this Act it shall be held to mean "common carrier."

The clauses we have italicized erect a legislative barrier against the construction put on the final settlement agreement by the Government in this case, and against the remitting or refunding in any manner or form any part of the rates and charges specified for carrying the freight. Language cannot be clearer or more positive.

The Congress did not stop with the legislation quoted, but at the foot of page 587 it enacted:

The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, *or strictly to observe such tariffs until changed according to law,* shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; *and it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession, or discrimination* in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof

*whereby any such property shall by any device whatever be transported at a less rate than that named, in the tariffs published and filed by such carrier,* as is required by said Act to regulate commerce and the Acts amendatory thereof, *or whereby any other advantage is given or discrimination is practiced.* Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars: Provided, That any person, or any officer or director of any corporation subject to the provisions of this Act, or the Act to regulate commerce and the Acts amendatory thereof, or any receiver, trustee, lessee, agent, or person acting for or employed by any such corporation, who shall be convicted as aforesaid, shall, in addition to the fine herein provided for, be liable to imprisonment in the penitentiary for a term of not exceeding two years, or both such fine and imprisonment, in the discretion of the court. (Italics not in original.)

That enactment not only makes it a misdemeanor for the corporation to willfully fail to strictly observe its published tariff, but also makes it a misdemeanor for any person or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession or discrimination in respect of the transportation of property whereby it shall by any devices whatever, be transported at a less rate than that named in the published tariffs, or whereby any other advantage is given or discrimination is practiced.

That which is commanded, as well as that which is forbidden, is set forth in plain, broad and comprehensive language, leaving no loop-hole for escape, and clearly covering the transaction here involved if the Government construction of the final settlement agreement be correct.

The enactment last quoted is a part of an amendment of section 1 of the Act of February 19, 1903 (32 Stat. 847 Sec.

708) known as the Elkins Act. That Act did not prescribe imprisonment as a punishment, an omission which was corrected in the Hepburn Act, as we have shown; otherwise this part of the Hepburn Act is a re-enactment of section 1 of the Elkins Act.

We submit the construction of the agreement that we are contending for makes it harmonize with the law of the land, "For it is a rule of interpretation that where a contract is fairly open to two constructions, by one of which it would be lawful and the other unlawful, the former must be adopted."

*Hobbs vs. McLean,* 117 U. S. 567, and cases there cited.

Respectfully submitted,

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